

FEDERAL COMMUNICATIONS COMMISSION
445 TWELFTH STREET, SW
WASHINGTON, DC 20554

MEDIA BUREAU
AUDIO DIVISION
APPLICATION STATUS: (202) 418-2730
HOME PAGE: www.fcc.gov/mb/audio/

MAY 31 2012

ENGINEER: GARY A. LOEHRS
TELEPHONE: (202) 418-2700
FACSIMILE: (202) 418-1410/1411
MAIL STOP: 1800B3
INTERNET ADDRESS: Gary.Loehrs@fcc.gov

Interlochen Center for the Arts
P.O. Box 199
Interlochen, MI

Re: WHBP(FM), Harbor Springs, MI
Facility ID No. 172716
Interlochen Center for the Arts
File No. BPED-20100707DZD

Dear Applicant:

This letter is in reference to the above-captioned minor change application to change antenna location and station class. WHBP also requests waiver of the contour overlap provisions of 47 C.F.R Section 73.509. For the reasons stated below, we deny WHBP's waiver request and dismiss the application.

Waiver Request

An engineering review of the application reveals that WHBP's proposed facilities would result in prohibited contour overlap with first-adjacent channel Class C2 license (BLED-20011128AAQ) and Class C1 construction permit (BPED-20091027AES) for WLJN-FM, Traverse City, MI, in violation of Section 73.509. Specifically, the proposed protected contour (60 dBu) would receive overlap from the interfering contour (54 dBu) of WLJN's facilities. WHBP recognizes this violation and requests waiver of the contour overlap provisions of Section 73.509.

In support of the waiver request, WHBP states that using the undesired-to-desired signal strength ratio method to define interference, the interference area would be over water or uninhabited land. WHBP further claims that the received overlap area is part of the Mackinaw State Forest and Michigan Islands National Wildlife Refuge, which are uninhabited and undeveloped islands on Lake Michigan. Accordingly, WHBP concludes that waiver of Section 73.509 is warranted in this instance.

Discussion

Allowing applicants to create new prohibited contour overlap effectively nullifies the protection mandated by Section 73.509 to noncommercial educational FM stations' 60 dBu protected service areas. In particular, the affected station would lose service area and population served without receiving any benefit in return. This interference interrupts the continuity of service

provided by WHBP throughout its protected service area, and thus diminishes the quality of FM service provided by the afflicted station. Over time, the grant of numerous similar waivers would degrade the quality of existing FM reception from stations throughout the entire noncommercial educational FM band. As the Commission stated in *Open Media Corp.*, 8 FCC Rcd at 4070, 4071:

It is the overall scheme of [noncommercial educational FM] allocations which is paramount, and when faced with a choice between a larger service area with overlap received on one hand, and lesser coverage with no prohibited overlap on the other, the Commission favors the latter. See *Educational Information Corporation*, 6 FCC Rcd 2207, 2208 (1991).

Interference showings based on field strength ratios are not acceptable and the Commission has consistently denied waiver requests which are based on this argument. Section 73.509 requires compliance with a contour established perimeter defining an area protected from overlap, not an area based on interference ratio calculations. The Commission currently has two rules intended to protect FM stations from interference (Section 73.509 for reserved band stations, and Section 73.215 for non-reserved band stations). Both sections require that determinations be made based upon prohibited contour overlap not the desired-to-undesired signal ratio. Previously, Section 73.509 provided for determination of interference based on the ratio method. However, the ratio method's usefulness for predicting interference in all cases has long been disputed. Recognizing this, the Commission amended its rules in Docket 20735 to adopt the current prohibited overlap version of Section 73.509 which prohibits the overlap of specified interfering and protected contours and avoids the anomalous results predicted by the ratio method.¹

Further, it is the Commission's charge, not applicants or licensees, to establish definitions of protected service and to ensure that protected service does not suffer interference. The goal of Section 73.509 is to prevent overcrowding of FM stations and provide a consistent, fair, efficient, and equitable distribution of FM facilities as required by Section 307(b) of the Communications Act.²

¹ "In the case of second and third adjacent channels, where the undesired signal can be stronger than the desired signal, an adjacent channel station located within the desired station's 1 mV/m contour can appear to comply with the U/D [undesired-to-desired] ratios at the 1 mV/m contour. However, it may actually cause excessive interference inside the 1 mV/m contour. Further, the U/D ratio appears to improve as the undesired station moves closer to the desired station's transmitter and away from the 1 mV/m contour. The *Second Notice* proposed to resolve the anomaly by simply specifying prohibited contour overlaps. Comments were supportive. Therefore, we shall adopt that option." *Third Report and Order*, para. 46, Docket 20735, 49 Fed. Reg. 45146 (November 15, 1984). Affirmed *Memorandum Opinion and Order*, Para. 56, 50 Fed. Reg. 27,954 (July 9, 1995).

² See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5358 (1991) (para. 13).

The Commission has granted waivers of Section 73.509 where existing noncommercial educational stations sought to increase the 60 dBu service contour so as to overlap the interfering contour of another noncommercial educational station and thereby receive overlap from a second-adjacent or third adjacent noncommercial educational FM stations. *See Educational Information Corp.*, 6 FCC Rcd 2207 (1991). Here, WHBP proposes to create new overlap with a first-adjacent station. Additionally, WHBP has not cited any published decision where the Commission granted a waiver under circumstances similar to the ones presented here.

Conclusion

The Commission's rules may be waived only for good cause shown.³ An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.⁴ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”⁵ and must support its waiver request with a compelling showing.⁶ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁷ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁸ However, waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.⁹ WHBP's request fails to present good cause for waiver of Section 73.509. WHBP has not shown sufficiently unique “special” circumstances, *i.e.*, rare and exceptional circumstances beyond its control to justify a waiver of Section 73.509. Finally, we find that the facts and circumstances set forth in the justification are insufficient to establish that granting waiver of Section 73.509 would be in the public interest.

³ 47 C.F.R. § 1.3.

⁴ *See Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

⁵ *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (“*WAIT Radio*”). *See also Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

⁶ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

⁸ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

⁹ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (“*Network IP*”); *Northeast Cellular*, 897 F.2d at 1166.

Thus the request for waiver of 47 C.F.R. Section 73.509 IS HEREBY DENIED and application BPED-20100707DZD IS HEREBY DISMISSED as unacceptable for filing. These actions are taken pursuant to 47 C.F.R. Section 0.283.

Sincerely,



Edna V. Prado
Supervisory Engineer
Audio Division
Media Bureau

cc: John Crigler, Esq.
Justin W. Asher